1879
10-680

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 253.

BOWLING EMBRY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 9, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 253.

BOWLING EMBRY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition filed March 23, 1876	1	1
Traverse	4	2
Findings of fact and conclusion of law	5	2
Opinions	7	4
1. Of the court	7	5
2. Dissenting opinion	8	5
Final judgment	10	7
Application for appeal, and order allowing same	11	7
Certificate	12	7

1 I. *Petition.—Filed March* 23, 1876.

In the United States Court of Claims.

BOWLING EMBRY
vs.
THE UNITED STATES. } No. 11326.

To the honorable the judges of the Court of Claims:

The petition of Bowling Embry respectfully represents that he is now and has been for about thirty-eight years, a citizen of the State of Tennessee; that on the 20th day of April, 1867, he was appointed by the President of the United States deputy postmaster at Nashville, Tennessee, and on the same day was confirmed by the Senate of the United States; that having given the necessary bond May 3rd, 1867, he was commissioned by the President, for the period of four years, as deputy postmaster aforesaid, said commission bearing date April 20, 1867, and he entered upon the discharge of the duties of said office on May 12, 1867.

Petitioner further represents that he continued in the discharge of the duties of said office without any fault, negligence, or malfeasance, giving his personal time and attention to the business of the office, to the entire satisfaction of Post-Office Department, and to the people of the city of Nashville and county of Davidson, and while so employed he was
2 suspended from office, without any cause whatever, and compelled to surrender it, and all the property, records, and papers of said office, to one Enos Hopkins, by an order of the President of the United States, dated May 5, 1869, and long before the term of office for which he had been commissioned had expired; that he surrendered said office to said Hopkins on the 27th day of May, 1869, and said Hopkins continued to hold possession of it and to receive the salary of same, which was $4,000 per annum, until the 25th day of July, 1870, at which time your petitioner again took possession of said office, under an order of the President dated July 21st, 1870.

Said Hopkins having been designated by the President, by the order of May 5, 1869, aforesaid, to take charge of said office on the suspension of your petitioner, was nominated to the Senate by the President December 6, 1869, and was rejected by the Senate July 15, 1870.

Petitioner further represents that from the 27th day of May, 1869, to the 25th day of July, 1870, which period was included within the term for which he was commissioned, he was deprived of said office, and he has received no salary or pay of any kind, but the salary for said period was paid to said Hopkins; that he has applied to the Postmaster-General for the salary due him from May 27th, 1869, to July 25th, 1870, and that officer has declined to allow the claim, and has refused to recognize his right to compensation for that period.

Petitioner further represents that he was entitled and had "a right to his office during the whole term" for which he was appointed and confirmed, and had a right to the salary thereof during the same period by virtue of his commission for the period of four years under the appointment of the President and confirmation of the Senate, that body not having consented, but, on the contrary, refused to consent, to his suspension or removal; that petitioner was ready, willing, and competent, during the whole period for which he was commissioned, to discharge
3 the duties of said office, but was prevented and prohibited by the order aforesaid; and that he is justly entitled to the sum of four

thousand six hundred and forty-four dollars and seventy-five cents ($4,644.75) salary, from the 27th day of May, 1869, to the 25th day of July, 1870.

Petitioner further represents that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government.

Wherefore petitioner prays judgment for the sum of four thousand six hundred and forty-four dollars and seventy-five cents.

BOWLING EMBRY.

JAMES H. EMBRY,
MATT. H. CARPENTER,
Counsel for Petitioner.

DISTRICT OF COLUMBIA,
Washington City, ss:

Bowling Embry, being duly sworn, says that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that he is justly entitled to the amount claimed from the United States, and that he believes the facts stated in said petition are true.

BOWLING EMBRY.

Sworn to and subscribed before me this 23d day of March, 1876.

JOHN RANDOLPH,
Ass't Clerk Ct. of Claims.

Post-office address of Bowling Embry is Nashville, Tennessee; James H. Embry, Washington, D. C.; Matt. H. Carpenter, Washington, D. C.

4 II. *Traverse.—Filed April* 5, 1876.

And now comes the Gttorney-General, on behalf of the United States and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of four thousand six hundred and forty-four dollars and seventy five cents says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

5 III. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 20th of April, 1867, the claimant was appointed by the President of the United States, by and with the advice and consent of the Senate, deputy postmaster at Nashville, in the State of Tennessee,

for the term of four years from that day, and the commission issued to him was in the following words:

"Andrew Johnson, President of the United States of America, to all who shall see these presents, greeting:

"Know ye, that reposing special trust and confidence in the integrity, ability, and punctuality of Bowling Embry, I have nominated, and, by and with the advice and consent of the Senate, do appoint him deputy postmaster at Nashville, in the State of Tennessee, and do authorize and empower him to execute and fulfill the duties of that office according to law; and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Bowling Embry, for the term of four years from the day of the date hereof, subject to the conditions prescribed by law.

"In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

"Given under my hand, at the city of Washington, the twentieth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and of the Independence of the United States of America the ninety-first.

[L. S.] "ANDREW JOHNSON.

"By the President:

"WILLIAM H. SEWARD,

"*Secretary of State.*"

II. Under this appointment the claimant entered upon the discharge of the duties of said office, and continued therein until the 27th of May, 1869, when, in consequence of an order made by the President of the United States, under the act of April 5, 1869, suspending him from said office, he delivered over said office to one Enos Hopkins, who had been designated by the President to perform the duties of deputy postmaster at Nashville, and the commission authorizing him to perform said duties was in the following words:

"Ulysses S. Grant, President of the United States of America, to all who shall see these presents, greeting:

"Know ye, that by virtue of the authority conferred upon the President by the second section of the act of Congress approved April 5, 1867, entitled 'An act to amend an act regulating the tenure of
6 certain civil offices,' I do hereby suspend Bowling Embry from the office of deputy postmaster at Nashville, in the State of Tennessee, until the end of the next session of the Senate; and I hereby designate Enos Hopkins to perform the duties of such suspended officer in the mean time, he being a suitable person therefor, subject to all provisions of law applicable thereto.

"In testimony whereof I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

"Given under my hand, at the city of Washington, the fifth day of May, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-third.

[L. S.] "U. S. GRANT.

"By the President:

"HAMILTON FISH,

"*Secretary of State.*"

III. On the 6th of December, 1869, the President nominated the said Hopkins to the Senate for appointment as deputy postmaster at Nashville, and on the 15th of July, 1870, the Senate resolved that it did not advise and consent to that appointment.

IV. On the 21st of July, 1870, the following communication was addressed and sent by the First Assistant Postmaster-General to the claimant:

"POST-OFFICE DEPARTMENT, APPOINTMENT-OFFICE,
Washington, D. C., July 21, 1870.

"SIR: In the case of Enos Hopkins, rejected by the Senate of the United States, under date of July 15, 1876, he is, under the provisions of the act of March 2, 1867, and April 5, 1869, regulating the tenure of certain civil offices, inhibited from holding, exercising, or discharging any of the duties pertaining to the office of postmaster at Nashville, Tenn. You should take charge of said office at once under your unexpired commission, for the time being and until the case can be submitted to the Attorney-General. Upon taking charge of the office you will receipt to Mr. Hopkins (in duplicate) for all the public property in his possession, and report the date of your doing so to this office.

"Very respectfully, &c.,

"J. W. MARSHALL,
"*First Assistant Postmaster-General.*

"BOWLING EMBRY, Esq.,
"*Nashville, Tenn.*"

In pursuance of the authority of said communication, the claimant again took possession of said office, on the 25th of July, 1870.

V. While the claimant was in possession of said office, prior and up to the 27th of May, 1869, he gave his personal attention to the business thereof to the entire satisfaction of the Post-Office Department and of the people of Nashville, and punctually and promptly rendered to the Sixth Auditor of the Treasury his accounts of all moneys collected and disbursed by him during that period, and promptly paid over to the United States all balances due from him to them, and his account was satisfactorily settled and adjusted on the books of the said Auditor's Office.

VI. During the whole period from May 27, 1869, to July 25, 1870, and afterward, the salary of said office was fixed by the Postmaster-
7 General at the rate of $4,000 per annum; and the same amounted for that period to $4,645.47 which was paid to said Hopkins, and refused to the claimant, who applied to the Postmaster-General for payment of the same to him.

Upon the foregoing facts the conclusion of law is that the claimant is not entitled to recover, for the reasons and upon the grounds set forth in the following opinion.

IV. *Opinions.*

DRAKE, Ch. J., delivered the opinion of the court:

Upon the facts as found, the court hold that the claimant has no cause of action.

Though his appointment as postmaster was expressed to be for four years from the date of his commission, yet the same commission also expressed that the appointment and the term were "subject to the conditions prescribed by law." That meant not only the conditions then

existing, but such as Congress might thereafter prescribe. As the office existed by the authority of Congress, the right of Congress to legislate in reference to it as it pleased is one of the things not to be questioned.

The second section of the act of April 5, 1869, "to amend 'An act regulating the tenure of certain civil officers,'" (16 Stat. L., 6,) enacts "that during any recess of the Senate the President is hereby empowered, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the United States courts, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed in his discretion by the designation of another, to perform the duties of such suspended officer in the mean time; and such person so designated shall take the oaths and give the bonds required by law to be taken and given by the suspended officer, and shall, during the time he performs his duties, be entitled to the salary and emoluments of such office, no part of which shall belong to the officer suspended; and it shall be the duty of the President, within thirty days after the commencement of each session of the Senate, * * * to nominate persons * * * in the place of all officers suspended; and if the Senate during such session shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the President shall nominate another person as soon as practicable, to said session of the Senate, for said office."

The Senate was in recess on the 27th of May, 1869, when the President suspended the claimant from office, and designated a person to perform his duties as postmaster, and the claimant delivered over the office to him. This was the exercise of an entirely discretionary authority vested in the President, and which he had the most undoubted right to exert, with or without cause, and entirely independent of the question whether there was any official misconduct on the part of the officer. The claimant may have been the best postmaster ever known, without the absolute right of the President to suspend him being at all diminished; or he may have been the worst ever known, without that right being an atom strengthened.

And the law leaves nothing open to doubt as to what should become of the salary and emoluments of the office during the period of suspension; not only providing that they should go to the person designated to perform the suspended officer's duties, but that no part of them should belong to the suspended officer.

8 This would seem to leave no possible ground for any right in this claimant to any part of the salary of the office while he was under suspension. But it was urged on his behalf, that, at any rate, he is entitled to the salary, at the rate of $4,000 per annum, from the 15th of July, 1870, when the Senate rejected the nomination of his successor, to the 25th of that month, when the office was surrendered back to him. This position is untenable, in view of the express declaration of the act that the person so designated "shall, during the time he performs his duties, be entitled to the salary and emoluments." And, as if foreseeing that some such claim as this might be made and the government be made liable to pay two salaries for the same office at the same time, one of them to a person who performed no work to earn it, the negative declaration is made that no part of the salary during that time should belong to the officer suspended. The act very properly gave the salary to him who performed the duties, and denied it to him who did not perform them.

The claimant's petition is dismissed.

Loring, J., though not present when this opinion was announced, concurred therein.

NOTT, J., dissenting:

Though it be conceded that the power of removal is vested by the Constitution in the whole of the appointing power, that is to say, in the President and Senate, and not in the President alone, nevertheless it seems to me incontrovertible that an intermediate power of suspension during the absence of the Senate must exist which can be ascertained and regulated by law.

That law in the present case is the tenure-of-office act, 1869, (16 Stat. L., p. 6, § 2,) which provides that "during any recess of the Senate, the President is authorized to suspend any civil officer" "until the end of the next session of the Senate, and to designate some suitable person, subject to be removed in his discretion by the designation of another, to perform the duties of such suspended officer in the mean time." It is evident from this that the utmost limit of the suspension is "until the end of the next session of the Senate," when it ceases absolutely ex vi termini; and that the powers and duties and rights and emoluments of the substitute are confined to the period designated as "in the mean time." On the instant that the Senate adjourns, the office reverts to the officer with all the profits which the law attaches to it; and on the same instant the right of the substitute to administer its affairs ceases and he becomes an intruder holding over in his own wrong. No action of the Executive is necessary to effect the restoration, and no action of the Executive could retard it—still less could the inaction of an executive department override the statute. Against these very plain and certain terms of the act nothing can be said except that it is subsequently provided that the substitute shall receive the salary of the suspended officer "during the time he performs his duties." The statute is thus expressed because that "time," which in no event can extend beyond the "end of the next session of the Senate," may be shortened in various ways; and the statute means that a substitute who serves for less than the whole period of suspension, shall be paid only for the time he serves. But it is manifest that a statute which expressly limits the time for which an officer can be ousted from his office, never could have been intended as an authority for the substitute to go on performing the duties of the office, and receiving its salary, after the
9 period of suspension has passed; nor can I conceive of such a thing as an officer legally invested with an office as to which another man, not legally entitled to hold it, may nevertheless perform its duties and receive its emoluments.

The point is of little importance in the present case; but as the decision will incorporate in the statute a provision not to be found there, and will confer upon the executive departments a discretionary power to prolong the suspension of an officer, which it was never intended they should have, I must dissent from so much of the decision as denies the right of the claimant to recover for the ten days' salary of his office withheld from him by the Post-Office Department after the period of his suspension had expired.

10 V. *Final judgment.*

BOWLING EMBRY
vs.
THE UNITED STATES. } 11326.

At a Court of Claims held at the Capitol in the city of Washington, on the 4th day of June, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

11 VI. *Application for appeal and order allowing same.*

From the judgment rendered in the above-entitled cause, on the 4th day of June, 1877, in favor of the defendants, the claimant, by his attorney, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

JAMES H. EMBRY,
Attorney.

Filed June 11, 1877.

Ordered that the appeal be allowed as prayed for.
By the court.
June 11, 1877.

12 In the Court of Claims.

BOWLING EMBRY
vs.
THE UNITED STATES. } No. 11326.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the attorney for the claimant for the allowance of an appeal, as filed in the clerk's office June 11, 1877, and of the order of the said Court of Claims allowing the same, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, and of the dissenting opinion.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 9th day of October, A. D. 1877.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 253. Bowling Embry, appellant, vs. The United States. Court of Claims. Filed 9th October, 1877.

OFFICE SUPREME COURT U.S.
FILED
APR 3 1880

IN THE

Supreme Court of the United States.

No. 253.—October Term, 1879.

Bowling Embry, Appellant,
vs.
The United States.

This is an appeal from the Court of Claims. That court find the facts as follows:

"I. On the 20th of April, 1867, the claimant was appointed by the President of the United States, by and with the advice and consent of the Senate, deputy postmaster at Nashville, in the State of Tennessee, for the term of four years from that day, and the commission issued to him was in the following words:

'Andrew Johnson, President of the United States of America, to all who shall see these presents, greeting:

'Know ye, that reposing special trust and confidence in the integrity, ability, and punctuality of Bowling Embry, I have nominated, and, by and with the advice and consent of the Senate, do appoint him deputy postmaster at Nashville, in the State of Tennessee, and do authorize and empower him to execute and fulfill the duties of that office according to law; and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Bowling Embry, for the term of four years from the day of the date hereof, subject to the conditions prescribed by law.

'In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

'Given under my hand, at the city of Washington, the twentieth day of April, in the year of our Lord one thousand

eight hundred and sixty-seven, and of the Independence of the United States of America the ninety-first.

[L. S.] 'ANDREW JOHNSON.

'By the President:

'WILLIAM H. SEWARD,

'*Secretary of State.*'

"II. Under this appointment the claimant entered upon the discharge of the duties of said office, and continued therein until the 27th of May, 1869, when, in consequence of an order made by the President of the United States, under the act of April 5, 1869, suspending him from said office, he delivered over said office to one Enos Hopkins, who had been designated by the President to perform the duties of deputy postmaster at Nashville, and the commission authorizing him to perform said duties was in the following words:

'Ulysses S. Grant, President of the United States of America, to all who shall see these presents, greeting:

'Know ye, that by virtue of the authority conferred upon the President by the second section of the act of Congress approved April 5, 1867 [1869], entitled 'An act to amend an act regulating the tenure of certain civil offices,' I do hereby suspend Bowling Embry from the office of deputy postmaster at Nashville, in the State of Tennessee, until the end of the next session of the Senate; and I hereby designate Enos Hopkins to perform the duties of such suspended officer in the meantime, he being a suitable person therefor, subject to all provisions of law applicable thereto.

'In testimony whereof I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

'Given under my hand, at the city of Washington, the fifth day of May, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-third.

[L. S.] 'U. S. GRANT.

'By the President:

'HAMILTON FISH,

'*Secretary of State.*'

"III. On the 6th of December, 1869, the President nominated the said Hopkins to the Senate for appointment as deputy postmaster at Nashville, and on the 15th of July, 1870. the Senate resolved that it did not advise and consent to that appointment.

"IV. On the 21st of July, 1870, the following communication was addressed and sent by the First Assistant Postmaster-General to the claimant:

'POST-OFFICE DEPARTMENT, APPOINTMENT OFFICE,
'*Washington, D. C., July* 21, 1870.

'SIR: In the case of Enos Hopkins, rejected by the Senate of the United States, under date of July 15, 1876 [1870], he is, under the provisions of the act of March 2, 1867, and April 5, 1869, regulating the tenure of certain civil offices, inhibited from holding, exercising, or discharging any of the duties pertaining to the office of postmaster at Nashville, Tenn. You should take charge of said office at once under your unexpired commission, for the time being and until the case can be submitted to the Attorney-General. Upon taking charge of the office you will receipt to Mr. Hopkins (in duplicate) for all the public property in his possession, and report the date of your doing so to this office. Very respectfully, &c.,

'J. W. MARSHALL,
'*First Assistant Postmaster-General.*

'BOWLING EMBRY, Esq.,
'*Nashville, Tenn.*'

"In pursuance of the authority of said communication, the claimant again took possession of said office, on the 25th of July, 1870.

"V. While the claimant was in possession of said office, prior and up to the 27th of May, 1869, he gave his personal attention to the business thereof to the entire satisfaction of the Post-Office Department and of the people of Nashville, and punctually and promptly rendered to the Sixth Auditor of the Treasury his accounts of all moneys collected and disbursed by him during that period, and promptly paid over to the United States all balances due from him to them, and his account was satisfactorily settled and adjusted on the books of the said Auditor's Office.

"VI. During the whole period from May 27, 1869, to July 25, 1870, and afterward, the salary of said office was fixed by the Postmaster-General at the rate of $4,000 per annum; and the same amounted for that period to $4,645.47, which was paid to said Hopkins, and refused to the claimant, who applied to the Postmaster-General for payment of the same to him.

"Upon the foregoing facts the conclusion of law is that the claimant is not entitled to recover, for the reasons and upon the grounds set forth in the following opinion."

Assignment of Errors.

1. The Court of Claims erred in holding as matter of law upon the facts found, that the claimant was not entitled to the salary of the office during the time he was suspended.

2. The court erred in holding that the claimant was not entitled to the said salary from the end of the next session of the Senate, after his suspension, even if not entitled to it during the time he was suspended.

Points in Argument.

I.

The act of Congress which provides that a suspended officer shall not receive the salary and emoluments of the office is unconstitutional.

The appointment gives the officer a legal right to the salary by law attached to the office, until he is removed, resigns, dies, or his term expires.

Marbury vs. Madison, 1 *Cranch*, 137.

The Constitution provides that the President shall nominate, and by and with the advice and consent of the Senate appoint, all officers of the United States. The power of removal is an incident to the power to appoint, and must be exercised by the President and Senate together. An act of Congress cannot locate the power of removal elsewhere. From this it follows that the claimant never was removed from the office, and, consequently, is entitled to the salary for the whole term.

II.

Conceding the act of Congress in question to be constitutional, and that the claimant was not entitled to the salary during the period of his suspension, still, the period of suspension being fixed by the statute to expire on the termination of the next session of the Senate, it follows that from that day the claimant was entitled to the salary. The judgment of the Court of Claims is erroneous to this extent, even should the act be held constitutional.

MATT. H. CARPENTER,
Of Counsel for Appellant.

OFFICE SUPREME COURT U. S.
FILED
APR 8 1880
D. W. MIDDLETON, Clerk.

In the Supreme Court of the United States.

BOWLING EMBRY, APPELLANT,
vs.
THE UNITED STATES.
No. 253.

APPEAL FROM THE COURT OF CLAIMS.

Appellees' brief.

Embry was nominated, confirmed, and commissioned as a deputy postmaster for four years, from April 20, 1867 (fol. 5). He was suspended on May 5, 1869, during the recess of the Senate by the President under authority conferred by Congress (§ 2, act April 5, 1869, 16 Stat., 7), but continued to act until May 27, 1869, when he turned the office over to Hopkins, the person designated to perform its duties (fols. 5, 6). At the next session of the Senate the President duly nominated Hopkins for the office, but on July 15, 1870, the last day of the session, the Senate declined to confirm him. On July 21, 1870, the Postmaster-General instructed Embry to take charge of the office at once under his unexpired commission, in pursuance of which he resumed it on July 28, 1870 (fol. 6). The salary of the office for the period from May 27, 1869, to July 25, 1870, amounted to $4,645.47, which was paid to Hopkins, and for this Embry sues (fol. 7). The court held he could not recover, but one

judge was of opinion he could recover the salary for the period from July 15 to July 25, 1870 (fol. 8, Nott., J).

ARGUMENT.

I.

As the suspension of the claimant in the President's discretion was expressly authorized, and the refusal to pay him the salary of the office for the time that Hopkins performed its duties required, by the second section of the act of 1869, he has to maintain that the provision authorizing such suspension is unconstitutional.

In so doing he concedes, however, the constitutionality of the original act of March 2, 1867 (14 St., 430), regulating the tenure of office and authorizing the President to suspend an officer during the recess of the Senate *for cause*, and the objection to the act of 1869 is solely to the right of Congress to empower such suspension *in the discretion* of the President.

This objection is not claimed to rest on any express restriction of the legislative authority. So far as understood it rests on the following course of reasoning: In 1789 there was a grave discussion by Congress of the constitutional power of the President to remove officers without the advice and consent of the Senate, and some eminent statesmen who affirmed that right also maintained that it could only be exercised for cause. If, therefore, a removal can only be made for cause, a suspension cannot be authorized except for cause.

The defects in this contention must be obvious. The views of Madison and other contemporaries of the Constitution are entitled to respect in interpreting a doubtful provision of that instrument, but there is no provis-

ion in it concerning the power of removal. Such a power in the President was deduced by inference, and the opinions cited as to the extent of such a power cannot be authoritative. They have really no bearing since the acts under which this case arises established a different doctrine as to the power of removal.

Assuming the correctness of that doctrine, and that Congress can regulate the action of the Executive in the recess, as the claimant concedes, what reason can be given for limiting the legislative power? Whose constitutional right is taken away by it? Is it alleged to be that of the Senate or President? The Senate united in the legislative act and the President has accepted its authority. The claimant is not guardian of their rights; he must show that his own are violated.

It may be said that he took office under the act of 1867, which authorized suspension only for cause, but it is well settled that when a public office is created by law there is no relation of contract between the State and the incumbent; and the power by legislation, in the absence of constitutional restriction, to regulate, change, or annul what has been so granted for public purposes is absolute. (Story on the Const., § 1393, note 3; Cooley's Const. Lim., 3d ed., 276 and note; Butler *vs.* Pennsylvania, 10 How., 402.)

If it is urged that public officers ought not to be suspended except for cause, the answer is that that is a political question which the Constitution has left, in all cases, except as to the judges, to be determined by the legislative or appointing power in its discretion. (*Ex parte* Hennen, 13 Peters, 230; U. S. *vs.* Avery, 212, 214.)

If constitutional warrant for the exercise of the legislative power is sought, it is readily found in the gen-

eral grant of authority to make all laws necessary and proper for carrying into execution the powers granted to Congress, and all other powers vested in the government, or in any department or officer thereof. The tenure-of-office acts are clearly within this grant, and the expediency or justice of their provisions are not revisable by the judiciary.

II.

The claimant has no right of recovery for the period from the adjournment of the Senate, on July 15, 1870, to July 25, 1870. The construction given to the statute by the majority of the court on that point (fol. 8) seems to be well founded. Congress was careful to leave no room for a double charge, and so made performance of the duties of the office a condition precedent to the right to compensation. Claimant may theoretically have been entitled to the office on July 15, 1870, just as Hopkins was on May 5, 1869; but as it took until May 27, or twenty-two days before Hopkins took possession, during which time Embry apparently held on, receiving the emoluments of the office, so it took some time (ten days) for him to get notice of his reinstatement and to prepare to take possession again, during which time Hopkins held on and did the work and so became entitled to the pay. As there is no pretense that the office was not given up to Embry the moment he applied for it or was ready to take it, the balance of advantage is decidedly in his favor, and he should be content therewith.

III.

If the claimant has any right of recovery it is partial only, for as his salary was due and payable quarterly in

the fiscal year, so much of the demand as is claimed for salary from May 27, 1869, to January 1, 1870, accrued more than six years before filing his petition and is barred. (Carter's case, 6 C. C., 31; Bachelor's case, 8 *Ib.*, 238.)

CHARLES DEVENS,
Attorney-General.
THOMAS SIMONS,
Assistant Attorney-General.